Similarly, xDSL does not work over the sizeable proportion of loops equipped with load coils or that have excessive bridge taps. Yet ILECs have uniformly refused to disable such load coils and bridge taps in response to CLEC requests, or even to provide pre-ordering processes which identify for CLECs which loops are encumbered in this way.[27] The importance of having access to preordering functions that identify xDSL-capable loops is further discussed in *Attachment A*.

Of course, by taking these positions, ILECs appear to be pre-judging the outcome of Commission action on petitions for deregulation under Section 706. In the hope that Section 706 relief ultimately will excuse their noncompliance, they are unilaterally refusing to comply with Sections 251-252 of the 1996 Act. ALTS requests that the Commission send a clear signal that ILEC hopes of using Section 706 to void their unbundling obligations for advanced technologies are misplaced, and should not be relied upon to delay providing unbundled access to xDSL functionalities.

### 3. CLECs Must Receive Access to Multiplexing Equipment at a Much Quicker Pace

Similar to the trunking delays cited above, CLECs often experience significant delays by ILECs in the deployment of proper multiplexing equipment used in conjunction with collocation to deliver advanced telecommunications services to customers. CLECs routinely face six to ten month delays by ILECs in installation and operational readiness of multiplexing equipment, and such delays often are well past confirmed service availability dates or commitments made. For example, in Boise, Idaho, one CLEC's network deployment was delayed more than ten months due to U S West's failure to deliver multiplexing within a reasonable and committed time-frame.

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[27] AT&T Comments, CC Docket Nos. 98-11, 98-26, 98-32 (RBOC Section 706 Petitions), at 19 n.37.

Such delays directly impede the development and deployment of competitive networks and the advanced telecommunications services that may be delivered over such networks.

### 4. New Federal Collocation Rules are Required to Ensure Just, Reasonable and Nondiscriminatory Access to ILEC Data Facilities

Following the *Iowa Utilities Board* holding that ILECs need not recombine all UNEs to create a network "platform," most ILECs have taken the position that CLECs must physically collocate at every point in the ILEC network where two UNEs must be connected. In short, ILECs are interpreting the Eighth Circuit decision to allow them to refuse to take *any* action to combine network elements. As ALTS has argued in its brief to the Supreme Court, this interpretation of the Eighth Circuit decision is inherently unreasonable. The enormous cost of physically collocating at every ILEC end office and tandem within a service area makes it cost prohibitive to serve any but the largest-volume customers, and effectively prevents CLECs from using UNEs made available by State commissions.

ILEC attempts to implement their interpretation of the Eighth Circuit decision illustrate the unreasonableness of this position. For example, in SBC's recent Section 271 proceedings before the Texas PUC, it identified five methods by which a CLEC may combine discrete UNEs. Two of these methods required physical collocation, and the three "virtual collocation" alternatives required construction of facilities *outside* the SBC offices.[28] Moreover, SBC contends that the rates for the virtual collocation options are not subject to the costing rules of Section 252 of the Act. Rather, SBC maintains that it will have the "discretion" to set rates at whatever level it deems appropriate.[29]

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28 Tex. PUC Section 271 Proceeding Tr., at ¶ 542.

29 *Id.* ¶ 710.

Bell Atlantic also takes the position that the Eighth Circuit decision forces CLECs to physically collocate at every point of UNE interconnection. Demonstrating the importance of Section 271 incentives, Bell Atlantic modified this position in the process of seeking authority to provide in-region interLATA service in New York. There Bell Atlantic-New York ("BA-NY") agreed to allow carriers to connect UNEs using virtual collocation, and committed to exploring other means of reducing the cost of collocation. However, despite its commitment to the New York PSC, BA-NY is refusing to implement these commitments until *after* it is granted in-region long distance authority.[30] In addition, the FCC has suspended, subject to an accounting order, virtual collocation rates filed by BA-NY,[31] noting that the rates submitted by BA-NY are subject to "substantial questions of lawfulness for the same reason that the [FCC] suspended and initiated investigations into other LECs' virtual collocation tariffs."[32]

Moreover, BA-NY's federal and New York tariffs contain differing rates and terms for physical collocation.[33] BA-NY has used this distinction between federal and state collocation to limit the functionality of CLEC collocation cages. For example, the New York PSC has ordered BA-NY to allow collocated CLECs to establish cross-connection between each other's cages, but the FCC has issued no similar directive. As a result, BA-NY takes the position that it will not allow CLECs with "federal" cages to cross-connect to CLECs with "state" cages, even though the cages are identical in a technical sense. In this way, BA-NY appears to be using any means available to limit the ability of CLECs to use collocated equipment cost effectively.

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30 *Petition of Telergy, Inc. for Arbitration*, New York PSC, Case No. 98-C-0536, filed April 6, 1998; Bell Atlantic – New York's Response to Telergy, Inc.'s Petition for Arbitration, filed May 1, 1998.

31 *NYNEX Telephone Companies Revisions to Tariff FCC No. 1,* Transmittal Nos. 494, 497 (rel. Apr. 16, 1998).

32 *Id.* ¶ 3.

33 *NY PSC Section 271 Proceeding Min.*, at 1397-98.

BellSouth also is using the Eighth Circuit decision to require collocation in ways that deny CLECs meaningful access to UNEs. BellSouth generally contends that the Court's decision requires CLECs to physically collocate to combine UNEs, but has stated that it will make a form of virtual collocation available. In order to use such virtual collocation, however, CLECs must collocate a "prewired" equipment frame that establishes connections between line side and trunk side circuits. BellSouth then plugs unbundled local loops and interoffice trunks into ports preselected by the CLEC.[34] This process is ridiculously cumbersome, and requires CLECs to plan for every circuit they provide well in advance in order to prewire the frame. The BellSouth approach effectively eliminates the utility of virtual collocation for a CLEC, and leaves no other realistic option but to use physical collocation for UNE combinations.[35]

By making physical collocation a requirement to obtain access to critical digital UNEs, ILECs many times effectively deny any access at all, because collocation space is simply unavailable in an increasing number of central offices. For example, no space was available in 15 of 54 central offices for which BA-NY received physical collocation requests during December 1997, and in 18 of the remaining central offices raw space was offered which could be used only after "conditioning" it at a prohibitive cost.[36] Even when collocation space is available, lead times to prepare the space have been unconscionable.[37]

The Commission should act quickly to compel ILECs to comply once and for all with their collocation obligations. In this instance, the Commission should itself move forward by

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34 Tennessee Regulatory Authority, *BellSouth Telecommunications, Inc.'s Entry into Long Distance (interLATA) Services in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996,* at v. II-E, p. 255, Tenn. RA Docket No. 97-00309 (May 5-12, 1998) [hereinafter "*Tenn. RA Section 271 Proceeding Tr.*"].

35 *See id.*, at v. VIII-A, p. 38.

36 Comments of AT&T, filed in CC Docket No. 98-11, at p. 18, n. 34 (April 6, 1998).

37 *See id.,* at n. 35.

reopening its Docket 91-141 and issuing new rules pertaining to collocation. Requirements should include, among other things:

- Establish that CLECs can use virtual collocation arrangements to combine UNEs.
- Provide for "cageless" collocation that allows CLECs to avoid the cost of constructing enclosures for their collocation space, and allows them to collocate in a total area of less than 10 square feet.[38]
- Provide for collocation cages of 25 square feet, and other increments less than 100 square feet.
- Allow multiple CLECs to share a single collocation cage.
- Allow collocated CLECs to establish cross-connects to cages of other collocated CLECs.
- Eliminate restrictions on CLECs' ability to collocate remote switching modules, xDSL electronics, internet routers and other advanced data equipment.
- Establish rates that reflect the total element long run incremental cost principles that the Commission has found to be required by Sections 251-252 of the Act.
- Establish reasonable and nondiscriminatory rules for the allocation of space preparation charges among collocated carriers.
- Establish reasonable and nondiscriminatory deployment intervals for new collocation arrangements, and expansion of existing arrangements.

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[38] More cost-effective collocation solutions will spur collocation in residential and less-densely populated areas. And because it more efficiently uses central office floor space, cage-less physical collocation also will make collocation available in many offices where ILECs unilaterally maintain that there is "no space" for cage-based physical collocation. One Bell Atlantic witness recently testified before the Massachusetts Department of Telecommunications and Energy that cage-less physical collocation would permit collocation in *every* Bell Atlantic central office in the state, and explicitly stated that cage-less physical collocation is a "highly efficient" utilization of central office space. He also admitted that cage-based physical collocation is a "highly inefficient" use of central office space. *See* Testimony of Karen Maguire, Bell Atlantic – Massachusetts, at 7, in Petition for Arbitration of Covad Communications Company, D.T.E. 98-21 (May 11, 1998).

- As an ongoing practice, incorporate into the Commission's collocation rules the most innovative and effective collocation provisions established by the State commissions.

No deregulatory relief under Section 706 should be granted until such a proceeding is concluded.

### 5. Nondiscriminatory Access to OSS is Critical to the Development of Data Services Competition

By now, it is an old story. The Commission found in its landmark *Local Competition Order* that ILECs' operational support systems ("OSS") represent "significant potential barriers to entry."[39] Without equal access to OSS, the Commission determined that CLECs will be "severely disadvantaged, if not precluded altogether, from fairly competing."[40] Finding that nondiscriminatory access to OSS is "vital to creating opportunities for meaningful competition,"[41] the Commission ordered ILECs to provide nondiscriminatory access to OSS no later than January 1, 1997.[42] Despite this clear instruction, ILECs nearly universally have ignored their obligation to provide equal access to OSS.

The Commission itself, of course, repeatedly has found that RBOCs have failed to unbundle OSS in accordance with its rules. In rejecting Ameritech's request of interLATA relief in Michigan, for example, the Commission stated that there is "convincing evidence. . . that Ameritech's OSS functions for the ordering and provisioning of resale services may contain serious system deficiencies that will likely magnify as the volume of commercial use increase."[43]

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39 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15763 (1996) [hereinafter "*Local Competition Order*"].

40 *Id.* at 15764.

41 *Id.*

42 *Id.* at 15767.

43 *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide in-Region, interLATA Services In Michigan,* CC Docket
(continued)

In particular, the Commission noted that "Ameritech's reliance on manual processing is substantial and appears to cause a significant deterioration in Ameritech's performance as orders increase."[44]

The Commission made similar findings after reviewing two separate requests by BellSouth for in-region long distance authority.[45] In rejecting BellSouth's South Carolina Section 271 application, the Commission concluded that "BellSouth has failed to demonstrate that it offers to competing carriers nondiscriminatory access to OSS functions, as required by the competitive checklist."[46] Specifically, the Commission determined that "BellSouth has not demonstrated that the access to certain OSS functions that it provides to competing carriers for pre-ordering, ordering, and provisioning of resale services and pre-ordering of unbundled network elements is equivalent to the access it provides to itself."[47] Finding little change in BellSouth's Louisiana Section 271 application, the Commission concluded that BellSouth's deficiencies with respect to its OSS preclude competing carriers from being able to compete fairly with BellSouth and render it noncompliant with the competitive checklist.[48]

The compliance of the other RBOCs is no better. Comments filed in response to the Bell Atlantic and U S West Section 706 petitions illustrate that these RBOCs have yet to establish

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No. 97-137, Memorandum Opinion and Order, ¶ 172 (rel. Aug. 19, 1997) [hereinafter *"Ameritech-Michigan Section 271 Order"*].

44 *Id.* ¶ 173.

45 *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina,* CC Docket No. 97-208, Memorandum Opinion and Order, ¶¶ 101-69 (rel. Dec. 24, 1997) [hereinafter *"BellSouth-South Carolina Section 271 Order"*]; *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana,* CC Docket No. 97-231, Memorandum Opinion and Order, ¶¶ 21-58 (rel. Feb. 4, 1998) [hereinafter *"BellSouth-Louisiana Section 271 Order"*].

46 *BellSouth-South Carolina Section 271 Order,* ¶ 87.

47 *Id.* ¶ 88.

access to OSS systems adequate to allow CLECs to compete. For example, AT&T revealed that its testing in the pre-merger Bell Atlantic states demonstrates that "Bell Atlantic is unable to handle even a minimal amount of orders, much less the volumes required for competitive entry."[49] In New York, Bell Atlantic has not even made available all of the technical specifications, business rules, and other technical and administrative information necessary for CLECs to complete the necessary OSS interfaces.[50] The New York PSC's Section 271 proceedings also bear this out. In a test of Bell Atlantic's ability to meet its self-established standards for providing live order confirmation for loops, Bell Atlantic met its interval only 50 percent, 90 percent and 57 percent of the time over the three day test period.[51]

ILECs keep hoping that the Commission's OSS requirements will just go away, or at least that the Commission's zeal to enforce them will dissipate. Grant of deregulatory relief as defined by the ILECs would vindicate this strategy for advanced services, and deny CLECs access to ILEC OSS which is critical to the successful deployment of their own advanced services.

### 6. CLEC NXXs Must be Loaded Into ILEC Switches Without Lengthy Delays

An important but oft-neglected requirement for implementation of competitive local exchange services is the proper loading and testing procedures for new entrant NXXs in ILEC switches. CLECs routinely experience problems with ILECs large and small when attempting to implement new or additional NXXs in a particular market.

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48 *BellSouth-Louisiana Section 271 Order*, ¶ 22.

49 AT&T Comments, CC Docket Nos. 98-11, 98-26, 98-32 (RBOC Section 706 Petitions), at 18.

50 *Id.*

51 *NY PSC Section 271 Proceeding Min.*, at 1821.

Such problems can be divided into two areas which effectively delay or curtail competitive entry and the timely provision of new telecommunications services. The first is a complete failure by ILECs to recognize, accept, and implement a new NXX associated with a particular rate center. The second problem is a partial or incomplete implementation of a new NXX in all ILEC switches within a particular geographic area. Either problem, experienced separately or concurrently, impedes CLECs' ability to offer competitive data services in new or existing markets.

### 7. CLECs Must Recognize Prompt Provisioning of End Office and Tandem Trunking

A disturbing and injurious problem that CLECs continuously encounter with ILECs is the extremely slow provisioning of end office and tandem trunking on the ILEC side of mutually agreed upon points of interconnection ("POI"). Interconnection agreements with ILECs have provisions relating to the procedures and terms under which the parties mutually determine the POIs for the exchange of local traffic. While it has been relatively easy to establish such POIs through negotiation, implementation and turn-up of adequate trunking by ILECs on their side of POIs has been, and remains, a network planner's worst nightmare.

CLECs routinely experience extensive delays by ILECs for requested turn-up of new or additional trunking facilities necessary to handle existing and forecasted traffic volumes. Such delays interfere with and adversely affect CLECs' relationships with their existing and potential customers. In particular, U S West has been extremely slow in many instances to turn-up additional inter-office trunking. In Vancouver, Washington, for example, U S West cannot provide one major CLEC direct end office trunking to one of the largest end offices in the metropolitan area because the office is at or near exhaust, uses dated analog technology, and replacement of the switch has been repeatedly deferred. This situation has impaired the CLEC's

ability to turn up customers, including data subscribers, in the service area of the U S West end office because customers will encounter significant blockage problems. Similar delays have been experienced in many other locations.

### 8. ILECs Are Using Litigation, and the Uncertainty it Creates, to Delay Implementation of the Act

In an ironic twist, the same ILECs that decried Judge Greene's supervisory role over the telecommunications industry only two years ago have themselves launched scores of lawsuits intended to impede the development of local competition. The Commission is painfully aware, of course, of ILECs' success in convincing the Eighth Circuit to gut critical portions of the Commission's local interconnection rules.[52] Indeed, the ink on the 1996 Act was barely dry before ILECs convinced the Eighth Circuit to strip the Commission of authority to (1) establish pricing rules for local interconnection, (2) require recombination of network elements, and (3) interpret and enforce local interconnection agreements. The Eighth Circuit's decision also rendered Section 252(i) of the Act toothless by vacating the Commission's "pick and choose" rule. Worse yet, when the Commission stated in its denial of Ameritech's request for interLATA authority in Michigan that use of TELRIC pricing would be required for approval under Section 271,[53] ILECs rushed back to a friendly forum in the Eighth Circuit to obtain an extraordinary *mandamus* order instructing the Commission not to attempt any regulation of ILEC pricing of local interconnection facilities.[54] There can be no doubt that, despite the Commission's best efforts and intentions, this ILEC litigation campaign has had a chilling effect on federal efforts to

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52 *Iowa Util. Bd. v. FCC,* 120 F.3d 752 (8th Cir. 1997).

53 *Ameritech-Michigan Section 271 Order*, ¶ 290.

54 *Iowa Util. Bd. v. FCC,* 135 F.3d 535, 537 (8th Cir. 1998).

implement the local interconnection, collocation, unbundling and resale requirements of Sections 251 and 252.[55]

Having succeeded in undermining critical aspects of the federal role in implementing Sections 251 and 252, ILECs next proceeded to ask the courts to void State commission attempts to implement Sections 251 and 252, as well. Thus, the same ILECs that persuaded the Eighth Circuit that State commissions are uniquely qualified to establish prices and interconnection arrangements under Sections 251 and 252 then filed scores of lawsuits in U.S. District Courts challenging the State commission decisions on these issues. U S West, SBC and GTE, for example, initiated lawsuits challenging most unfavorable arbitration and pricing decisions by State commissions in their territories.[56] The same State commissions, which were portrayed as all-knowing to the Eighth Circuit, are branded in the ILEC appeals as arbitrary and intent on

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[55] In remarks made before the National Association of State utility Consumer Advocates, Chairman Kennard commented on the delay in implementation of the 1996 Act caused by the uncertainty created by these judicial decisions:

> There have been setbacks, of course. We have seen Congress' careful design disrupted by judicial rulings that have added uncertainty, slowed investment and planning, and frustrated promising entry strategies.
>
> Without these setbacks, we would be further along. And these decisions threaten to continue to hobble the development of competition and to deny our country the growth that broad telecom competition would create.

Remarks by William Kennard, Chairman – Federal Communications Commission, to the National Association of State Utility Consumer Advocates (as prepared for delivery), at 3, Feb. 9, 1998 (http://www.fcc.gov/speeches/kennard/spewek803.html).

[56] Worse yet, an SBC-led lobbying effort led the Arkansas legislature to enact legislation which has the effect of prohibiting the Arkansas PSC from rendering arbitration awards which are unfavorable to SBC. *Petitions Seeking Declaratory Rulings Preempting Arkansas Public Service Commission*, CC Docket No. 97-100 (petitions by e.spire (ACSI) and MCI seeking to preempt the Arkansas PSC's arbitration of local interconnection agreements) (petitions still pending); Arkansas Public Service Commission, *AT&T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Sec. 252(b) of the Telecommunications Act of 1996,* Ark. PSC Docket No. 96-395-U, Order No. 12 (Apr. 17, 1998) (Arkansas PSC order finding that the Arkansas Telecommunications Regulatory Reform Act of 1997 requires the PSC to decide all arbitration issues in favor of SBC).

engaging in unconstitutional takings of their property.[57] Indeed, ILECs routinely have asked reviewing courts to junk the entire record painstakingly developed by the State commissions and conduct court proceedings *de novo*. The message from ILECs is clear. To competitors, the message is to accept the ILEC position in negotiations or be outspent and dragged through the courts interminably. To the State commissioners, it is to do to the ILECs' bidding or risk being sued individually.[58]

ILECs have not even been able to resist the temptation to use litigation to rewrite the interconnection agreements which they have entered into voluntarily. After rebuffing early CLEC attempts to establish "bill and keep" arrangements to govern the mutual termination of each other's local traffic, ILECs reached voluntary (non-arbitrated) agreements with many CLECs providing for the payment of specified reciprocal compensation rates for such local transport and termination services. When confronted by CLECs with the first bills for service, however, most ILECs reneged on their obligation to pay reciprocal compensation for local calls placed to ISPs. As 17 State commissions in succession ruled that reciprocal compensation must be paid for ISP traffic under the terms of local interconnection agreements, ILECs once again ran to the courts asking them to set aside actions taken by regulators to enforce Sections 251 and 252 of the Act.[59] At least one court already has rewarded Ameritech by enjoining enforcement of an

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57 *In the United States District Court for the District of New Mexico* – U S West Communications, Inc., a Colorado corporation v. Eric Serna, Jerome Block, and William Pope, Commissioners of the New Mexico State Corporation Commission; and Western Wireless Corporation, a Washington corporation, Civil Case No. 97 00124JP/JHG.

58 *Id.* Notably, in most such actions each individual Commissioner has been named as a party defendant.

59 Arizona Corporation Commission, *Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996,* Opinion and Order, Decision No. 59872, Ariz. CC Docket Nos. U-2752-96-362 and E-1051-96-362 (Oct. 29, 1996); Colorado Public Utilities Commission, *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of*

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*Interconnection Rates, Terms, and Conditions with U S West Communications, Inc.*, Decision Regarding Petition for Arbitration, Decision No. C96-1185, Co. PUC Docket No. 96A-287T (Nov. 5. 1996); Connecticut Department of Public Utility Control, *Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Service Provider Traffic*, Final Decision, Conn. DPUC Docket No. 97-05-22 (Sept. 17, 1997); Florida Public Service Commission, *Complaint of WorldCom Technologies, Inc. Against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Partial Interconnection Agreement under Section 251 and 252 of the Telecommunications Act of 1996 and Request for Relief,* Staff Recommendation, Fla. PSC Docket No. 97-1478-TP (Feb. 26, 1998); Illinois Commerce Commission, *Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois: Complaint as to Dispute over a Contract Definition,* Opinion and Order, Ill. CC Docket No. 97-0404 (Mar. 11, 1998); Maryland Public Service Commission, Letter from Daniel P. Gahagan, Executive Secretary, to David K. Hall, Esq., Bell Atlantic –Maryland, Inc., Md. PSC Letter (Sept. 11, 1997); Michigan Public Service Commission, *Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan,* Opinion and Order, Mich. PSC Case Nos. U-11178, U-111502, U-111522, U-111553 and U-111554 (Jan. 28, 1998); Minnesota Department of Public Service, *Consolidated Petitions of AT&T Communications of the MidWest, Inc., MCIMetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration with U S West Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996,* Order Resolving Arbitration Issues, Minn. DPS Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Dec. 2, 1996); New York Public Service Commission, *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Order Closing Proceeding, NY PSC Case No. 97-C-1275 (Mar. 19, 1998); North Carolina Utilities Commission, *Interconnection Agreement between BellSouth Telecommunications, Inc. and US LEC of North Carolina, Inc.*, Order Concerning Reciprocal Compensation for ISP traffic, NC UC Docket No. P-55, SUB 1027 (Feb, 26, 1998); Oregon Public Utility Commission, *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996*, Decision, Or. PUC Order No. 96-324 (Dec. 9, 1996); Tennessee Regulatory Authority, *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Initial Order of Hearing Officer, Tenn. RA Docket No. 98-00118 (Apr. 21, 1998); Texas Public Utility Commission, *Complaint and Request for Expedited ruling of Time Warner Communications,* Order, Tex. PUC Docket No. 18082 (Feb. 27, 1998); Virginia State Corporation Commission, *Petition of Cox Virginia Telecom, Inc. for Enforcement of Interconnection Agreement with Bell-Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers,* Final Order, Va. SCC Case No. PUC970069 (Oct. 24, 1997); Washington Utilities and Transportation Commission, *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and U S West Communications, Inc. Pursuant to 47 U.S.C. § 252,* Arbitrator's Report and Decision, Wash. UTC Docket No. UT-960323 (Nov. 8, 1996), aff'd *U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-22WD (W.D. Wash. Jan. 7, 1998); West Virginia Public Service Commission, *MCI Telecommunications Corporation Petition for Arbitration of Unresolved Issues for the Interconnection Negotiations Between MCI and Bell Atlantic – West Virginia, Inc.*, Order, WV PSC Case No. 97-1210-T-PC (Jan. 13, 1998); *see also* Oklahoma Corporation Commission, *Application of Brooks Fiber Communications of Oklahoma, Inc., and Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating to Internet Service Providers*

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Illinois Commerce Commission order requiring Ameritech to honor its reciprocal compensation commitments.[60]

No one denies that ILECs have a right to seek judicial resolution of legitimately open issues. However, it is evident that the ILEC litigation strategy is focused at least as much on harassing competitors and delaying implementation of the Act's local competition provisions as it is to correcting errors. For example, despite the fact that payment of reciprocal compensation for ISP traffic is a generic issue, BellSouth, SBC and Bell Atlantic made each affected CLEC in Florida,[61] Texas[62] and Maryland,[63] respectively, file individual complaints and relitigate identical issues to receive compensation.

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*and Enforcing Compensation Provisions of the Interconnection Agreement with Southwestern Bell Telephone Company,* Okla. CC Cause No. PUD 970000548 (Feb. 5, 1998) (ALJ decided that ISP traffic is not subject to reciprocal compensation; however, this decision is not final and conflicts with a Staff recommendation). At least 3 other states – Delaware, Kentucky and Ohio – are now considering this issue. *See* Delaware Public Service Commission, *Petition of MCI Telecommunications Corporation for the Arbitration of Unresolved Issues from Interconnection Negotiations with Bell Atlantic-Delaware, Inc.,* Arbitration Award, Del. PSC Docket No. 97-323 (Dec. 16, 1997); Kentucky Public Service Commission, *ACSI d/b/a e.spire Communications, Inc. v. BellSouth Telecommunications, Inc.,* Ky. PSC Case No. 98-212 (complaint filed Apr. 22, 1998).

60 *See* Telephony, *Comm. Daily*, May 4, 1998, at 5 ("Acting on Ameritech appeal, U.S. Dist. Court, Chicago late Fri. stayed Ill. Commerce Commission (ICC) rules that company must pay reciprocal compensation to competitive LEC's (CLECs) for calls that go to Internet service providers (ISPs).").

61 *See, e.g.,* Florida Public Service Commission, *Complaint of WorldCom Technologies, Inc. Against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Partial Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, and Request for Relief,* Fla. PSC Docket No. 971478-TP; Florida Public Service Commission, *Complaint of Intermedia Communications, Inc. Against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Partial Interconnection Agreement Under Sections 251 and 2525 of the Telecommunications Act of 1996, and Request for Relief,* Fla. PSC Docket No. 980495-TP.

62 *See Tex. PUC Section 271 Proceeding Tr.,* ¶¶ 1632-1639, 1643-1645, 1652 (prior to the Texas PUC's Section 271 hearings, in which Texas PUC Chairman Wood made clear that "[t]he generic determination that ISP traffic is local is one that we made [previously], and that has general applicability, SBC had forced each CLEC to arbitrate the ISP reciprocal compensation issue separately).

As if their attempts to use litigation to derail enforcement of Sections 251 and 252 directly were not enough, RBOCs also have beseeched the courts to eliminate Section 271 – the most powerful incentive provided by Congress to ensure voluntarily RBOC compliance with Sections 251 and 252. Employing a successful strategy of forum-shopping, three RBOCs succeeded in convincing a U.S. District Court judge in Texas to invalidate Sections 271-275 of the Act as unconstitutional "bills of attainder."[64] If allowed to stand, the ruling would eradicate the requirement for RBOCs to satisfy the 14-point "competitive checklist" contained in Section 271 before providing in-region interLATA services, and, thereby, would eliminate the most powerful incentive for RBOC compliance with the interconnection and unbundling requirements of the Act.[65]

Neither the FCC nor the courts can stop ILECs from pursuing their anticompetitive litigation strategy.[66] However, the Commission can and should recognize that, if successful, the ILEC litigation strategy could effectively forestall the full implementation of Sections 251 and 252 of the Act. This, in turn, would delay realization of the Commission's Section 706 mandate.

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63 *See, e.g.*, Maryland Public Service Commission, *Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996,* Md. PSC Case No. 8731 – Phase (b-II), Proposed Order of Hearing Examiner, at 10-19 (hearing examiner adopted MCI's position in arbitration over the ISP reciprocal compensation issue with Bell Atlantic noting that the Maryland PSC already had decided the issue in a Sept. 11, 1997 letter ruling requested by MFS).

64 *SBC Communications, Inc. v. FCC,* 981 F. Supp. 996 (N.D. Tex. 1997) (order stayed pending appeal before the Fifth Circuit, 1998 WL 119707 (Feb. 11, 1998)).

65 Notably, the U.S. Court of Appeals for the D.C. Circuit recently issued a decision contrary to the one referred to here. *BellSouth Corp. v. FCC,* 2998 WL 242244 (D.C. Cir. May 15, 1998) (holding that Section 274 of the Communications Act, which restricts RBOC provisioning of "electronic publishing," does not constitute an unconstitutional bill of attainder).

66 BellSouth, for example, has vowed to "litigate [the TELRIC pricing issue] to the end," threatening that, if the *Supreme Court* resurrected TELRIC "from its well-deserved grave" it would launch another round of litigation that will prolong regulatory uncertainty
(continued)

Thus, the Commission should make clear to ILECs that they cannot have it both ways – they cannot seek deregulation of their advanced telecommunications services while perpetuating their local service monopolies. Just last week, the chairman of the Texas PUC cited SBC's court challenges of arbitrated interconnection agreements as a major factor in the Texas PUC's decision to deny an affirmative Section 271 recommendation.[67] ALTS similarly urges the Commission to state unequivocally that no ILEC will obtain regulatory relief pursuant to Section 706 until the pro-competitive provisions of Sections 251, 252 and, if applicable, 271 are implemented fully and irrevocably – that is, until ILECs have accepted the obligations imposed on them by Congress.

### B. Sections 251(c) and 271 are Necessary Conditions to Achieving Section 706

ILECs contend that Section 706 grants the Commission authority to waive the statutory requirements of Sections 251(c) and 271 of the Act, and permit them to offer broadband services

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"well into the next century." Comments of BellSouth, CCB/CPD Docket No. 98-15 (APT Section 706 Petition), at 3-4, 8.

67 The Texas PUC announced its opposition to SBC's interLATA services entry bid on May 21, 1998. No official documentation of the Texas PUC's decision was available at the time of this filing. However, press reports indicate that among the major unresolved issues cited by the Texas PUC commissioners was the "judicial overhang" (as described by Texas PUC Chairman Wood) that resulted from SBC's (1) litigation seeking to overturn Section 271 (and the other RBOC line of business restrictions) and (2) reliance on arbitrated interconnection agreements to satisfy its Section 271 requirements that are the result of Texas PUC orders still being appealed by SBC. While the Commissioners were careful to agree that SBC has the right to appeal its orders, they expressed tremendous discomfort over SBC's request that they recommend that the FCC grant interLATA relief based on arbitrated interconnection agreements that could be overturned in court. *See* Texas PUC Opposes SW Bell's InterLATA Services Entry Bid, *TR Daily,* May 22, 10998, at 1-2; *see also* PUC Abruptly Hangs Up on Bell Plan; Says Long-Distance Conditions Unmet, *Houston Chronicle*, May 22, 1998, at Business p. 1 ("The regulators also complained that even after signing agreements with competitors, Bell has cast a wide net of litigation that could undermine those agreements in the future.").

without regard to unbundling requirements or interLATA service restrictions.[68] However, Section 706 does not constitute an independent grant of forbearance authority. While it is true that Section 706 requires the Commission to utilize alternative methods of regulation as required to encourage the deployment of advanced telecommunications capabilities, Congress merely listed "regulatory forbearance" as one of several "regulating methods" that the Commission may use to achieve that goal. Thus, Section 706 does not create forbearance authority – it simply authorizes the Commission to utilize the forbearance authority granted elsewhere in the Act as appropriate to encourage the deployment of advanced telecommunications services.

The Commission's forbearance authority is explicitly defined in Section 10 of the Act,[69] which the RBOCs conveniently have chosen to ignore. Upon examination of the text of Section 10, the reasons for the RBOCs' attempt at a statutory sleight-of-hand becomes evident. Namely, Section 10 expressly places forbearance from enforcing the requirements of Section 251(c) and 271 "off limits" until the RBOCs can demonstrate that both sections have been implemented fully. Specifically, Section 10(d) states that:

> [e]xcept as provided in Section 251(f), the *Commission may not forbear from applying the requirements of Section 251(c) or 271* under subsection (a) of this section until it determines that those requirements have been fully implemented.[70]

Of course, this is a showing that RBOCs currently are unable or unwilling to make. No RBOC has yet received interLATA relief under Section 271 for *any* state where it serves as the ILEC,

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68 *See Bell Atlantic Section 706 Petition* (CC Docket No. 98-11), at 1-4; *U S West Section 706 Petition* (CC Docket No. 98-26), at 1-5; *Ameritech Section 706 Petition* (CC Docket No. 98-32), at 2-4.

69 47 U.S.C. § 160.

70 *Id.* § 160(d) (emphasis added). The limitation in Section 10(d) includes an exception for rural carriers per Section 251(f). Inclusion of this exception precludes the prospect that additional exceptions may be available.

and none even has an application for approval under Section 271 pending before the Commission as of the date of this filing.

Nevertheless, RBOCs – being unwilling or unable to demonstrate full implementation of Sections 251(c) and 271 and therefore unable to petition for forbearance from those provisions under Section 10 – have implored the Commission to find in the words "regulatory forbearance" in Section 706 a novel source of forbearance authority to support an end run around the provisions of Sections 251(c) and 271, and to short-circuit the explicit language of Section 10.[71] This tortured attempt at statutory construction cannot be countenanced. Apart from the fact that the text of Section 706(a) offers no support for the ILEC interpretation, it is nonsensical to believe that Congress simultaneously would establish a strict and explicit prohibition against forbearance from enforcing Sections 251(c) and 271 in Section 10(d) of the Act, and then nullify that mandate via a vague reference in Section 706.

Congress regarded strict compliance with the Section 271 competitive checklist as sufficiently critical to expressly bar the Commission from waiving its requirements. Section 271(d)(4) provides that "[t]he *Commission may not,* by rule or otherwise, *limit* or extend the terms used in *the competitive checklist*" which the Petitioners must meet before being granted in-region interLATA authority.[72] At a minimum, the competitive checklist, as it pertains to competition for advanced data services, requires full implementation of:

- the interconnection requirements of Section 251(c)(2);[73]
- the unbundling requirements of Section 251(c)(3);[74]

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71 It would be a strange result, indeed, if a simple cross-reference in Section 706 – which is not even codified in the U.S. Code – were permitted to "trump" the express limitations specified in the codified provisions of Section 10.

72 47 U.S.C. § 271(d)(4) (emphasis added).

73 *Id.* § 271(c)(2)(B)(i).

- the resale requirements of Section 251(c)(4);[75] and
- the collocation requirements of Section 251(c)(6).[76]

Section 271(d)(4), thus, reflects a congressional judgment that RBOC implementation of items included in the competitive checklist, including Section 251(c), is fundamental to the success of the 1996 Act. Congress' intent is reinforced by the limitation placed on the Commission's forbearance authority in Section 10(d) of the Act. Nothing in Section 706, including the listing of "regulatory forbearance" as one of the "regulating methods" available to encourage deployment of advanced telecommunications infrastructure, indicates that Congress intended to undo the twice fortified requirements of Sections 251(c) and 271(c) in exchange for ILEC investment in advanced telecommunications infrastructure.[77]

ALTS is pleased that individual Commissioners recently recognized that Section 10(d) appears to preclude the Commission from forbearing from applying Section 271 requirements in the context of a Section 271 petition. Although expressly reserving final judgment, Chairman Kennard, for example, recently informed Senator McCain that "Section 10(d) appears to preclude the Commission from forbearing from applying Section 271 until section 271 has been

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74 *Id.* § 271(c)(2)(B)(ii).

75 *Id.* § 271(c)(2)(B)(xiv).

76 *Id.* § 271(c)(6).

77 The Commission itself acknowledged its lack of discretion to waive Section 271 requirements in its recent decision in *Petition for Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona ("U S West LATA Order")*, 12 FCC Rcd 4738 (1997). In the *U S West LATA Order*, the Commission recognized that its ability to forbear from enforcing Section 271 is limited by Section 10(d) and, on that basis, denied U S West's requests to consolidate LATAs. *Id.* ¶¶ 25-26. Indeed, the Commission found that "[t]he Act expressly prohibits the Commission from abstaining in any way from applying the requirements of Section 271 until those requirements have been *fully implemented*." *Id.* at ¶ 26 (emphasis added).

fully implemented and does not contain any express exception for section 706."[78] Each of the other Commissioners concurred in this assessment.[79]

Thus, ALTS hereby requests that the Commission resolve that requests for regulatory forbearance made pursuant to Section 706 will not be considered until the ILEC seeking relief has fully implemented Section 251(c) and, if applicable, Section 271.

## III. THE COMMISSION SHOULD PRESERVE AND ENHANCE PROCOMPETITIVE RULES AND POLICIES ADOPTED BY STATE COMMISSIONS

Since the passage of the 1996 Act over two years ago, State commissions across the country have expended enormous time and resources in fulfilling their obligations to implement the Act. Their prodigious efforts have resulted in initiatives that are beginning to promote full and fair competition in both voice and data services. In determining how to achieve the goals of Section 706, ALTS submits that the Commission needs to take care to preserve these State initiatives, and adopt federal counterparts where appropriate, so that competition brought about by CLECs will continue to flourish.

### A. Section 706 Jointly Assigns Jurisdiction to the FCC and State Commissions

The language of Section 706 unambiguously assigns both the obligation and the authority to promote the deployment of advanced telecommunications jointly to federal and state regulators:

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78 Letter from Chairman Kennard to Hon. John McCain (April 29, 1998), at 9.

79 Letter from Commissioner Ness to Sen. McCain (April 29, 1998), at 7; Letter from Commissioner Powell to Sen. McCain (April 29, 1998), at. 5; Letter from Commissioner Tristani to Sen. McCain (April 29, 1998), response to Q. 17; Letter from Commissioner Furchgott-Roth to Sen. McCain (April 29, 1998), response to Q. 17.

> (a) IN GENERAL. – The *Commission and each State commission* with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all American....[80]

The dual federal/state jurisdictional structure established by Section 706 mirrors the coordination of federal and state jurisdictional oversight found in Sections 251, 252 and 271 of the 1996 Act. This shared jurisdictional structure was specifically noted by the Pennsylvania Public Utilities Commission ("Pennsylvania PUC") in the comments it filed opposing the RBOC 706 petitions:

> The PaPUC opposes the [BOC 706] Petitions because they do not comply with Section 706(a). The PaPUC, as a state commission jointly authorized with the FCC in the management of Section 706 matters, has been neither consulted or petitioned by the RBOCs in this regard. The PaPUC opposes the Petitions because the claims and counterclaims present substantially conflicting evidence that cannot be resolved without additional hearings. Moreover, the evidentiary conflicts preclude any conclusion that the public interest, convenience, and necessity is enhanced by Section 706 forbearance. Finally, the RBOCs have not established that the public is better served by stopping in the competition envisioned under Sections 251, 271, 272 in favor of monopoly.[81]

As is discussed in the next Section, State commissions already have established extensive rules and regulations to implement the procompetitive provisions of Sections 251, 252 and 271 of the Act, and are continuing to establish creative and effective means of promoting competition and technical innovation.[82] The FCC must not take action unilaterally under Section 706 that would disrupt these State commission initiatives.

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80 *Section 706(a)* (emphasis added).

81 [Reply] Comments of the Pennsylvania Public Utilities Commission in Opposition to the Petitions of [Bell Atlantic], U S West and Ameritech Corporation for Relief Under Section 706 of the Telecommunications Act of 1996, CC Docket Nos. 98-11, 98-26, 98-32 (RBOC Section 706 Petitions), at 12-13.

82 Chairman Kennard has noted that several State commissions have been pioneers in the movement away from local service monopolies and toward local competition:

> Of course, for many of you, passage of the Act only ratified your own views and work. After all, many of you began

(continued)

### B. The Commission Must Not Unilaterally Take Action Under Section 706 That Will Disrupt State Regulatory Initiatives Established Under the Act, or Other Sources of Authority

Since the passage of the 1996 Act, State commissions across the country have been conducting major proceedings designed to implement the Act virtually non-stop. Through interconnection arbitrations, proceedings considering RBOC petitions for interLATA relief under Section 271, rate cases for everything from permanent UNE rates to geographic deaveraging of basic service rates, and the reform of universal service systems, State commissions have invested massive resources in implementing the 1996 Act. In many cases, this effort has resulted in the development of innovative regulatory structures that balance the interests of consumers, ILECs and CLECs, and hold substantial promise for establishing a competitive environment for advanced data services. It is imperative that the Commission avoid taking any action under Section 706 that would disrupt this progress. Below, ALTS gives examples of some of the specific rules and regulations developed by State commissions that hold promise for promoting competition for local services and the deployment of advanced technologies throughout the country – and that could be undone if the Commission were to grant the relief sought by RBOCs in their Section 706 petitions.

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> the process of creating local telephone competition even before there was real hope that the 1996 Act would actually pass. Illinois, Michigan, New York, Florida, California, and many other states pioneered laws to open up local telephone markets.

Speech of FCC Chairman William E. Kennard to the Annual Convention of the National Association of Regulatory Utility Commissioner (as prepared for delivery), at 4, Nov. 10, 1997 (http://www.fcc.gov/speeches/kennard/spwek701.html).

### 1. State-Specific Rules Governing the Combination of UNEs Are Critical to Deployment of CLEC Data Services

In response to CLEC complaints, a number of State commissions have found that ILECs are required to provide competitive carriers with combinations of various UNEs. The Texas PUC, for example, expressly rejected SBC's argument that the Eighth Circuit's *Iowa Utilities Board* decision invalidating many of the Commission's interconnection rules also invalidates provisions of arbitrated interconnection agreements that require combinations of UNEs.[83] In the ongoing Texas PUC Section 271 proceeding, Chairman Wood noted:

> [T]he whole problem from all along has been if a customer is yours [SBC's] and wants to become theirs [a competitive carrier's], those things are already put together. I think from a public policy point of view we don't want you to just pull them apart and put them together to make busy work so you can charge more money. We want them to stay together so there's not a fail point in the process for customers.[84]
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> [The 8th Circuit has] not envisioned you tearing those things apart. They said provide access to them [CLECs]. They [CLECs] can put them together. This Commission interpreted that as saying you got to pay for it as if they are being put back together. So we calculated what the rate should be and said [SBC] may charge that rate.[85]

The Texas PUC reiterated its concern when it found that the UNE combination provisions of existing interconnection agreements will terminate over the next few months as the first set of arbitrated interconnection agreements expire, and SBC would not commit to renew

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83 Texas Public Utility Commission, *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops*, Tex. PUC Docket No 16189, Amendment and Clarification of Arbitration Award, at 4 (Nov. 24, 1997).

84 *Tex. PUC Section 271 Proceeding Tr.*, ¶ 532.

them.[86] Out of a concern that the expiration of existing interconnection agreements would result in the disruption of services to CLECs, the Texas PUC initiated a services of collaborative sessions that will address a permanent solution for this and related issues.[87]

The New York PSC has taken a different approach to combinations of UNEs, requiring Bell Atlantic to file tariffs that provide various types of UNE combinations.[88] Following the Eighth Circuit decision, Bell Atlantic attempted to withdraw the tariff, but was prevented from doing so by action of the New York PSC. In *Attachment A*, ALTS discusses how grant of the deregulatory relied sought by the RBOCs in their 706 petitions would impair the PSC's action.

In addition, the New York PSC and the Pennsylvania PUC both have initiated proceedings under Section 271 of the Act that likely will result in Bell Atlantic making UNE combinations available. As part of its attempt to obtain State recommendations in support of a grant of authority to provide in-region interLATA services, Bell Atlantic embarked on a series of negotiations with the New York PSC and others. As a result of these discussions, Bell Atlantic issued a "Prefiling Statement" that commits to a series of actions that it will undertake in return for an affirmative recommendation for interLATA relief under Section 271 of the Act, including that "Bell Atlantic-NY will provide to CLECs combinations of network elements...." In Pennsylvania, Pennsylvania PUC Commissioner Rolka has issued his own version of the

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85 *Id.* ¶ 533.

86 *See, e.g., id.* ¶¶ 478-516, 542, 653, 846.

87 *See* Texas PUC Opposes SW Bell's InterLATA Services Entry Bid, *TR Daily*, May 22, 1988, at 1-2.

88 New York Public Service Commission, *Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network,* Order Initiating Proceeding, NY PSC Case No. 98-C-0690 (May 6, 1998).

Prefiling Statement – modified to address Pennsylvania-specific issues – and has set it out[89] for public comment, stating that the Pennsylvania PUC will take action that is largely consistent with that taken in New York.[90]

In these cases and others, the regulatory approaches taken by the State commissions are critical to CLEC efforts to expand the reach of their own advanced data services, but will be undone if the FCC grants the deregulatory relief requested by RBOCs in their Section 706 petitions. RBOCs have asked that both services and equipment that employ new technologies such as xDSL be insulated from the requirements of Sections 251, 252 and 271 of the Act. But the ability of CLECs to have ILECs combine xDSL functionality with loops, multiplexing and interoffice transport is critical to CLEC plans to expand the reach of their data services. The Commission should act promptly to reinforce these State initiatives and rebuff premature ILEC requests for deregulation pursuant to Section 706.

### 2. State Decisions Requiring Sub-Loop Unbundling Facilitate the Expansion of xDSL Services

In its *Local Competition Order,* the Commission did not order the ILECs to make subloop elements available as UNEs, but ceded that decision to the State commissions.[91] Indeed, the Commission specifically stated that "[w]e encourage states to pursue subloop unbundling in

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89 New York Public Service Commission, Pre-Filing Statement of Bell Atlantic-New York, filed in *Petition of New York Telephone Company for Approval of Its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996,* NY PSC Case No. 97-C-0271, at 8 (Apr. 6, 1998).

90 Pennsylvania Public Utilities Commission, Motion of Commissioner David W. Rolka, filed in *Bell Atlantic-Pennsylvania's Entry into In-Region InterLATA Services Under Section 271 of the Telecommunications Act of 1996,* Pa. PUC Docket No. M-00960840 (Apr. 23, 1998).

91 *Local Competition Order*, 11 FCC Rcd. at 15696, n.851.